IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

INDUSTRIAL ENTERPRISES, INC.	*	
Plaintiff	*	
v.	*	Civil Action No. RDB-07-2239
PENN AMERICA INSURANCE COMPANY	*	
	*	
Defendant	*	

* * * * *

MEMORANDUM OPINION

Plaintiff Industrial Enterprises, Inc. filed this action against Defendant Penn America Insurance Company in order to recover defense costs under a comprehensive general liability policy. Specifically, Industrial Enterprises seeks reimbursement for past insurance defense costs, as well as future defense costs, related to its opposition of efforts by the United States Environmental Protection Agency ("EPA") to include property owned by Industrial Enterprises as a National Priority List ("NPL") or "Superfund" site under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9601, *et seq*.

Pending before this Court is Plaintiff's Motion for Partial Summary Judgment (Paper No. 23), which relates only to Defendant's duty to defend and does not address the cost of that defense. This Court held a hearing on August 14, 2008 pursuant to Local Rule 105.6 (D. Md. 2008). For the reasons set forth below, Plaintiff's Motion for Partial Summary Judgment (Paper No. 23) is GRANTED.

BACKGROUND

In Policy No. SMP12848, Penn America insured Industrial Enterprises from January 10, 1984 to January 10, 1985 for first party property coverage (Section I) and third-party liability coverage (Section II). The third-party liability coverage portion of the policy provides that Penn America "will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence, and arising out of the ownership, maintenance, or use of the insured premises . . . , and [Penn America] shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage." (Def.'s Resp. Ex. 2.)

The grant of liability insurance coverage in the policy is subject to certain limitations, including a pollution exclusion. The pollution exclusion provision provides that the insurance policy does not apply

> to bodily injury or property damages arising out of the discharge dispersal, release or escape of smoke vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.*

(*Id*. (emphasis added).) Therefore, the pollution exclusion does not apply to "sudden and accidental" pollution, and thus the insured *is* covered in such circumstances.[1]

[1] The policy also contains an "owned property" exclusion. The owned property exclusion states that the insurance policy does not apply "to property damage to (1) property owned or occupied by or rented to the insured; (2) property used by the insured, or (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control." (Def.'s Resp. Ex. 2.) Penn America does not rely on that

On July 9, 1999, the EPA issued a demand letter to Industrial Enterprises that identified the company as a "Potentially Responsible Party" ("PRP") with respect to five parcels of land that it owned within the 68th Street Dump Site ("the Site"). The Site is a 168-acre property in the City of Baltimore and Baltimore County. The letter advised that Industrial Enterprises "may have incurred liability under Section 107(a) [of CERCLA, 42 U.S.C. § 9607(a)] with respect to the 68th Street Dump . . . Site]." (Pl.'s Mem. Supp. Partial Summ. J. Ex. A, at 1.) More specifically, the letter stated as follows:

> [The EPA] believes that you are a PRP for this Site. PRPs under CERCLA include: 1) current owners and operators of the site; 2) owners and operators of the site at the time the hazardous substances were disposed; 3) persons who arranged for disposal or treatment of hazardous substances sent to the site; and 4) persons who accepted hazardous substances for transport to the site, and who selected the site for disposal. Specifically, EPA has reason to believe that Industrial Enterprises, Inc., is an owner of the Site.

(*Id*. at 2.) The letter also informed Industrial Enterprises that the EPA had "documented the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site as those terms defined in the under Section 107(a) of the [CERCLA]" and that the EPA was planning to conduct an investigation. (*Id*.)

On September 29, 1999, Industrial Enterprises gave written notice to Penn America (and various other insurers) of EPA's environmental property damage claim. In its letter, Industrial

---

provision for purposes of its potential duty to defend: "For the purposes of this motion, which relates to Penn America's duty to defend, Penn America is not relying on the 'owned property' exclusion. However, Penn America is not waiving its right to rely on the 'owned property' exclusion with regard to any claim by [Industrial Enterprises] for indemnity [of] costs related to repair or remediation of its own property." (Def.'s Resp. 4 n.2.)

Enterprises identified Policy No. SMP12848 with Penn America as having provided its primary insurance for the policy period in 1984. On October 21, 1999, Penn America sent Industrial Enterprises a letter acknowledging receipt of the notification letter and requesting additional information about the EPA's investigation. After continued correspondence between Industrial Enterprises and Penn America over several years, counsel for Industrial Enterprises advised Penn America by letter on August 2, 2002 that the EPA had not taken any further action.

In April 2003, the EPA renewed its proposal to place the Site, including Industrial Enterprises's parcels, on the National Priority List. On July 30, 2003, after the EPA initiated an informal notice and comment rulemaking process, counsel for Industrial Enterprises submitted comments to the EPA in response to the renewed proposal, which included a "Parcel by Parcel History" of the five parcels of land owned by Industrial Enterprises. On August 12, 2003, Industrial Enterprises sent a copy of its comments to Penn America.

On June 15, 2004, Penn America denied Industrial Enterprises's claim for defense costs and indemnity coverage for two reasons:

> The claim presented arises from continual polluting activities, occurring over a long period of time and in the course of business operations, which do not give rise to a potentiality for coverage under the sudden and accidental language of the pollution exclusion. Further, the claim is excluded under the owned property exclusion.[2]

(*Id*. Ex. N, at 2.) On August 27, 2004, Industrial Enterprises reached a confidential settlement with most private parties involved in the EPA's investigation of the Site. In April 2006, the private parties also reached a partial settlement with the EPA, requiring an elaborate Remedial

[2] As mentioned above, with respect to the duty to defend, the latter reason given by Penn America is immaterial, as it "is not relying on the 'owned property' exclusion." (Def.'s Resp. 4 n.2.)

Investigation and Feasibility Study of the site. According to Industrial Enterprises, there are still remaining liability issues regarding the site. Therefore, Industrial Enterprises will continue to incur defense costs.

On March 4, 2008, Industrial Enterprises filed the subject Motion for Partial Summary Judgment (Paper No. 23). Industrial Enterprises seeks a judgment as to the liability portion of its Complaint, but does not currently request a determination of any amount of money already spent for defense costs. Penn America filed a Response on March 21, 2008 (Paper No. 27), and Industrial Enterprises filed its Reply on April 3, 2008 (Paper No. 28). This Court conducted a hearing on August 14, 2008 pursuant to Local Rule 105.6 (D. Md. 2008).

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court explained that only "facts that might affect the outcome of the suit under the governing law" are material. *Id.* at 248. Moreover, a dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court further explained that, in considering a motion for summary judgment, a judge's function is limited to determining whether sufficient evidence supporting a claimed factual dispute exists to warrant submission of the matter to a jury for resolution at trial. *Id.* at 249. In that context, a court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving

party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

As an initial matter, an insurance policy is a contract and contract language is to be interpreted objectively. *Clendenin Bros. v. U.S. Fire Ins. Co.*, 889 A.2d 387, 393 (Md. 2006). There is no dispute in this case that there is a valid policy or that Industrial Enterprises is the named insured. The dispute in the pending Motion centers around whether Penn America has a duty to defend Industrial Enterprises under the terms of the insurance policy, as construed under Maryland law.

Under Maryland law, an insurer has a duty to defend its insured if the claim asserted against the insured is potentially covered by the insurance policy. *Aetna Casualty & Surety Company v. Cochran*, 651 A.2d 859, 861 (Md. 1995). This standard is intended to pose a relatively easy burden for the insured. *See Clendenin Bros.*, 889 A.2d at 392-93 ("If there is a possibility, *even a remote one*, that the plaintiff's claims could be covered by the policy, there is a duty to defend." (emphasis added and citations omitted)). Indeed, any uncertainty as to whether there is a "potentiality of coverage . . . is to be resolved in favor of the insured." *Cochran*, 651 A.2d at 864.

As recently explained by the Court of Appeals of Maryland in *Clendenin Bros.*, a reviewing court must undertake a two-prong inquiry in resolving whether an insurer has a duty to defend, as follows:

> (1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? (2) do the allegations in the tort action potentially bring the tort claim within the policy's coverage? The first question focuses upon the language and requirements of the policy, and the second question focuses upon the allegations of the tort suit.

Clendenin Bros., 889 A.2d at 392-93 (quoting *St. Paul Fire & Marine Insurance Company v. Pryseski*, 438 A.2d 282, 285 (Md. 1981)).

As to the first prong, the insurance policy in question contains a pollution exclusion. (*See* Pl.'s Mem. Supp. Partial Summ. J. Ex. A, at 1 (listing as excludable "smoke vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants").) Plaintiff has not disputed that the EPA's action is based on the discharge of "irritants, contaminants or pollutants," and therefore Defendant has met its initial burden of demonstrating that the claim is subject to the pollution exclusion. The pollution exclusion, however, does not apply to "any discharge, dispersal, release or escape [that] is sudden or accidental." (*Id*.) Thus, although the insurance policy in question does *not* cover damage caused by pollution generally, it *does* cover damage caused by "sudden and accidental" pollution.

The "sudden and accidental" clause is commonplace in insurance contracts and has been the subject of considerable litigation. In Maryland, as in a majority of jurisdictions, the "sudden and accidental" clause is interpreted as "provid[ing] coverage only for pollution which is both sudden *and* accidental. It does not apply to gradual pollution carried out on an ongoing basis during the course of business."[3] *American Motorists Ins. Co. v. ARTRA Group*, 659 A.2d 1295,

[3] A minority of jurisdictions interpret "sudden" and "accidental" synonymously to mean "unintended." Under this interpretation, pollution that was unintended falls within the "sudden and accidental" clause, even if the pollution was gradual. *See, e.g., Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814 (Colo. 2004) (finding that contaminants gradually polluting the soil and groundwater may be a covered event if unexpected or unintended); *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 742, 754 (Pa. 2001) (concluding that "sudden and accidental" means "both gradual and abrupt pollution or contamination so long as it was unexpected and unintended").

1308 (Md. 1995). In other words, under Maryland law, pollution that is both temporally isolated and unintended is covered because it meets the "sudden and accidental" exception to the pollution exclusion. Pollution that accumulates gradually, even if unintended, is not covered.

In determining whether "discrete events carried out on an ongoing basis" fall within the "sudden and accidental" exception, the *ARTRA* court cited favorably the United States Court of Appeals for the Sixth Circuit's decision in *Ray Industries, Inc. v. Liberty Mutual Insurance Co.*, 974 F.2d 754 (6th Cir. 1992). In *Ray Industries*, the Sixth Circuit explained as follows:

> [The insured] has argued that each release was sudden, when viewed in isolation. But under this theory, all releases would be sudden; one can always isolate a specific moment at which pollution actually enters the environment. Rather than pursuing such metaphysical concepts, we choose to recognize the reality of [the insured's] actions in this case, . . . [which]

Id. at 768-69; *see also A. Johnson & Co., Inc. v. Aetna Cas. and Sur. Co.*, 933 F.2d 66 (1st Cir. 1991) (interpreting "sudden" in this context with "its unambiguous, plain and commonly accepted meaning of temporally abrupt").

Given the interpretation of "sudden and accidental" clauses under Maryland law, the issue presented in Plaintiff's pending motion is whether the EPA's action against Plaintiff is potentially covered by the insurance policy under the second prong of the *Clendenin Bros.* inquiry.[4] Because this issue hinges on whether the allegations are potentially covered, the

[4] In the typical context within which a duty to defend may arise, the insured is sued in court by a third party. Plaintiff argues that an administrative agency demand letter is no different under Maryland law than a complaint filed in court. (Pl.'s Mem. Supp. Partial Summ. J. 14-15.) In support, Plaintiff cites *Bausch & Lomb, Inc. v. Utica Mutual Insurance Co*., 625 A.2d 1021 (Md. 1993), in which the Court of Appeals found that the administrative agency action in that case was sufficiently adversarial and coercive to require the payment of defense costs. *Id.* at 1032.

EPA's demand letter is the principle document in this case. If it chooses, the insured may also use extrinsic evidence to establish a potentiality of coverage if the allegations in the complaint are unclear. *Cochran*, 651 A.2d at 863-66. The insurer, however, may not use extrinsic evidence to contest coverage, *Id*. at 63 (citing *Brohawn v. Transamerica Insurance Co.*, 347 A.2d 842, 850 (Md. 1975)), even if the "insurer may get information from the insured or from any one else, which indicates, or even demonstrates, that the injury is not in fact covered." *Brohawn*, 347 A.2d at 850 (citations omitted).

The demand letter sent by the EPA to Plaintiff on July 9, 1999 informed it only that the EPA believed that Plaintiff may be a PRP under CERCLA because of "the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site." (Pl.'s Mem. Supp. Partial Summ. J. Ex. A, at 2.) The vague allegations do not mention any specific polluting activities or any possible causes, let alone whether such activities or causes could potentially be characterized as "sudden and accidental." In this regard, the demand letter in this case is easily distinguishable from the underlying complaint in *ARTRA*, a case relied upon by Defendant. In *ARTRA*, the complaint specifically sought relief from the insured because, over the course of several years and during the insured's regular business operations, there were "thousands of [leaking] drums of hazardous and toxic chemicals," "over fifty [leaking] underground storage tanks," and "numerous spills of hazardous substances." *ARTRA*, 659 A.2d at 1310. Based on these allegations, the *ARTRA* court was capable of finding that there was no

---

This argument has not been opposed by Defendant, and this Court finds that the demand letter and the subsequent actions taken by the EPA are at least as adversarial and coercive as in *Bausch & Lomb*. Therefore, the EPA's demand letter informing Plaintiff that it was a PRP was tantamount to a lawsuit and consequently may trigger a duty to defend.

potentiality of coverage because "the allegations . . . *clearly* show that the claim is based on a pollution problem alleged to have resulted from the cumulative effects of numerous releases which occurred on an ongoing basis as part of the regular course of business over a long period of time." *Id*. at 1311 (emphasis added). This Court is unable to make a similar finding in this case, as the EPA's demand letter does rule out the possibility that it is based, at least in part, on a sudden and accidental occurrence. Therefore, based solely on the demand letter, there remains a potentiality of coverage.

In further support of its claim, Plaintiff has submitted extrinsic evidence that, at least arguably, demonstrates that an oil spill occurred in or around the five parcels owned by Plaintiff during the relevant policy period, and that this incident was specifically relied upon by the EPA in its decision to issue the demand letter.[5] On December 24, 1984, the Maryland Water Resources Administration ("MWRA") sent a letter to Plaintiff informing it that an oil pollution violation occurred. (Pl.'s Mem. Supp. Partial Summ. J. Ex. D.) The letter states that "on June 28, 1984, and [on] subsequent investigation, [the investigator] found that petroleum product, determined to be fuel oil, is emerging from the bank of a tributary to Back River." (*Id*.) Eastern Stainless Steel Company, which owns a property that also abuts Back River, was likewise cited by the MWRA because it discharged oil into the Back River in late February 1984, about four

[5] Defendant argued at the hearing that most of the extrinsic evidence offered by Plaintiff is inadmissible because it was not properly authenticated and, as such, should not be considered by this Court on a motion for summary judgment. "It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment . . . . To be admissible at the summary judgment stage, 'documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e).'" *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993) (quoting Charles A. Wright *et al.*, *Federal Practice and Procedure* § 2722, at 58-60 (1983 & 1993 Supp.)). Plaintiff's documentary evidence was submitted as attachments to the sworn, signed declaration of its attorney and therefore will be considered by this Court.

months prior to the date oil was seen on Plaintiff's property. Based on these documents, this Court finds that Plaintiff has established that there is a potentiality of coverage, even if such potential is remote. Therefore, Plaintiff has "demonstrate[d] that there is a reasonable potential that the issue triggering coverage will be generated at trial."[6] *ARTRA*, 659 A.2d at 1311.

In response, Defendant relies extensively on comments that Plaintiff submitted to the EPA after its April 2003 proposal to place the Site on the NPL. The comments were provided to Defendant by Plaintiff and, according to Defendant, demonstrate conclusively that the EPA's demand letter against Plaintiff was not because of any "sudden or accidental" discharge. Instead, the comments demonstrate that the pollution on Plaintiff's land was due to: 1) landfill activities of its licensee; 2) the presence of buried drummed waste, hundreds of old tires, and junked cars; 3) storm water migrating from Eastern Stainless's metallurgical operations; 4) lagoons filled with municipal waste; 5) daily discharges from the neighboring Back River sewage treatment plant; 6) storm water discharges from the railroad tracks in the area; and 7) storm water from Interstates 695 and 95. (Def.'s Resp. 26.)

This argument does not relieve Defendant of its duty to defend Plaintiff, wholly apart from its narrower duty to indemnify Plaintiff. First, Defendant may not rely on additional extrinsic evidence even if it received the documents from Plaintiff. *Brohawn*, 347 A.2d at 850 (stating that the insurer may not use extrinsic evidence, even if the "insurer may get information from the insured or from any one else, which indicates, or even demonstrates, that the injury is

[6] Defendant argues there is no specific reference to "sudden or accidental" occurrences in either of the above-mentioned MWRA letters or, for that matter, in any other document relied upon by Plaintiff. Because there is also no specific reference to any gradual or intended occurrences, there remains a potentiality of coverage.

not in fact covered"). Second, "legal memoranda, unlike pleadings or affidavits, do not generally constitute binding judicial admissions" and therefore the Plaintiff's comments in response to the EPA's action may not be used by Defendant in this case to avoid defense costs. *N. Ins. Co. v. Balt. Bus. Communs., Inc.*, 68 Fed. Appx. 414, 421 (4th Cir. 2003 (unreported). Third, in the duty to defend context, Defendant is obligated to defend any claim that is potentially covered under the policy, "notwithstanding alternative allegations outside the policy's coverage, until such times . . . that the claims have been limited to ones outside the policy coverage." *Southern Md. Agric. Assoc., Inc. v. Bituminous Cas. Corp*., 539 F. Supp. 1295, 1299 (D. Md. 1982) (applying Maryland law) (quoting *Steyer v. Westvaco Alan Appleman Insurance Law and Practice*, 450 F. Supp. 384, 389 (D. Md. 1978)). On this final point, unless and until it is demonstrated that either the 1984 "spill" was not relied upon by the EPA or that it was not a "sudden and accidental" event as defined under Maryland law, Defendant has a duty to defend its insured, Industrial Enterprises.[7] This issue may arise later in the course of this litigation in terms of the amount of defense costs owed, or in subsequent litigation on the duty to indemnify.

Therefore, although this issue comes before the Court on Plaintiff's Motion for Summary

[7] Defendant has alternatively argued that it needs additional discovery under Rule 56(f) of the Federal Rules of Civil Procedure. This Court does not believe additional discovery is needed at this time. "A Rule 56(f) motion for additional discovery is properly denied when the additional evidence sought to be discovered would not create a genuine issue of material fact sufficient to defeat summary judgment." *Amirmokri v. Abraham*, 437 F. Supp. 2d 414, 420 (D. Md. 2006) (citing *Strag v. Board of Trustees, Craven Comm. Coll.*, 55 F.3d 943, 954 (4th Cir. 1995)). Based on the nature of the pending Motion, only Plaintiff is entitled to submit extrinsic evidence and, as such, any additional discovery conducted by Defendant could not be considered by this Court in resolving the issue before it and therefore would not create a dispute of material fact.

Judgment, which requires all disputed facts be viewed in Defendant's favor, any doubt as to whether there is a potentiality of coverage must be resolved in Plaintiff's favor. At this time, based on the EPA's demand letter and the extrinsic evidence relied on by Plaintiff, it cannot be determined whether the EPA was relying on one isolated event, as Plaintiff argues, or on gradual pollution arising over the course of several decades, as Defendant argues. Therefore, this Court finds that there remains a potentiality of coverage under the insurance policy.

CONCLUSION

For the reasons stated, Plaintiff Industrial Enterprises's Motion for Partial Summary Judgment (Paper No. 23) is GRANTED. A separate Order and Partial Judgment follows.

Dated: September 2, 2008

/s/
Richard D. Bennett
United States District Judge